No. 89-618

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN J. BRUNO and JOHN W. MENDICINO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 5311 *et seq.*, and the regulations promulgated thereunder, prohibit structuring transactions in order to cause a financial institution to fail to file Currency Transaction Reports.

2. Whether the district court properly admitted evidence seized during the execution of a search warrant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-59) is reported at 879 F.2d 1087. The memorandum opinion and order of the district court (Pet. App. 60-70) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 71-73) was entered on June 29, 1989. Petitions for rehearing were denied on August 10, 1989 (Pet. App. 74-75). The petition for a writ of certiorari was filed

on October 10, 1989 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were each convicted on one count of conspiring to defraud the United States and to make material false statements in a government matter, in violation of 18 U.S.C. 371 (Count 1); on 46 counts of failing to file and causing American Investors of Pittsburgh, Inc. (AIP) to fail to file Currency Transaction Reports (CTRs), in violation of 31 U.S.C. 5313 and 5322(b) (Counts 2-47); and on 47 counts of causing the Pittsburgh National Bank (PNB) to fail to file CTRs, in violation of 31 U.S.C. 5313 and 5322(b) (Counts 48-94). Petitioner Mendicino was sentenced to a two-year term of imprisonment on the conspiracy count and to a $10,000 fine on Count 2. Petitioner Bruno was sentenced to a two-year term of imprisonment on the conspiracy count and to a $25,000 fine on Count 2. Both were sentenced to concurrent three-month terms of imprisonment on the 92 remaining counts, to be served concurrently with the sentence imposed on the conspiracy count. See Pet. 5-6.

1.a. At the time of the offenses, co-defendant American Investors of Pittsburgh, Inc. (AIP) was a broker and dealer of securities, registered with the Securities and Exchange Commission. Petitioner Bruno was AIP's President, while petitioner Mendicino was the company's Executive Vice President.[1]

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[1] Co-defendants Charles Krzywicki, AIP's Secretary-Treasurer, and Alan Zytnick, an AIP customer, were also

The evidence at trial showed that between 1979 and 1983 petitioners and their co-defendants engaged in a conspiracy to fail to file and to cause a financial institution to fail to file CTRs for numerous currency transactions in excess of $10,000.[2] During this period,

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convicted. Along with AIP, both Krzywicki and Zytnick filed petitions for a writ of certiorari. This Court denied certiorari in those cases. See *American Investors of Pittsburgh, Inc.* v. *United States*, cert. denied, No. 89-491 (Nov. 6, 1989); *Zytnick* v. *United States*, cert. denied, No. 89-520 (Nov. 6, 1989).

[2] Under federal law, a financial institution is required to file a CTR whenever a customer engages in a currency transaction in excess of $10,000. 31 U.S.C. 5313; 31 C.F.R. 103.22(a) (1982).

Section 5313(a) of Title 31, U.S.C., provides in relevant part:

> When a domestic financial institution is involved in a transaction for payment, receipt, or transfer of United States coins or currency * * * in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

Section 103.22(a) of Title 31 of the Code of Federal Regulations provides:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

Each Currency Transaction Report form contained the following provision (Treasury Form 4789 (1980)):

> * * * Multiple transactions by or for any person which in any one day total more than $10,000 should be treated

AIP repeatedly received more than $10,000 in currency at a time from its customers, including co-defendant Zytnick, but it never filed a CTR. AIP devised various recordkeeping devices to disguise those cash receipts, such as using dead or inactive accounts. Petitioners assisted that operation by altering AIP's records and customers' monthly statements, so that cash transactions of more than $10,000 were inaccurately portrayed as a series of transactions in amounts of less than $10,000 a day. Pet. App. 9-10, 55-59.

AIP maintained two accounts at a branch of the Pittsburgh National Bank (PNB) in which the company deposited its cash receipts. After it learned in September 1980 that the bank would have to file CTRs on currency transactions of more than $10,000 AIP began structuring its deposits so that no single deposit exceeded $10,000. The company accomplished that by making multiple deposits of less than $10,000 —but aggregating to more than $10,000 on a single day—into one or both of its accounts. Pet. App. 10-11, 49-55.

In September 1982, a new PNB branch manager advised AIP that the bank would have to file CTRs when AIP's cash transactions at the bank in a single day aggregated to more than $10,000. When Mendicino asked the bank manager how filing could be avoided, the manager told him that AIP should have been filing CTRs itself. On at least one occasion thereafter, AIP conducted business at two branches of the bank, rather than transacting its business at a single branch, as it had before. Pet. App. 11-12.

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as a single transaction, if the financial institution is aware of them.

b. On May 13, 1983, a United States magistrate issued a search warrant for AIP's offices. Pet. App. 12. The warrant identified 19 categories of records to be searched for and seized, together with a final category authorizing the search and seizure of "[o]ther documents and items which are fruits, instrumentalities, and/or evidence of violations of Title 31, United States Code, Sections 5313 *and* Title 18, United States Code, Section 2 and 371." Pet. App. 77-78.

In support of the warrant, Special Agent C. Robert Tate of the Internal Revenue Service, Criminal Investigative Division, filed an extensive affidavit. Pet. App. 79-103. In the affidavit, Agent Tate stated that he had received information from a confidential source that AIP was laundering substantial amounts of money obtained from narcotics trafficking without filing CTRs; that he had confirmed from IRS records that AIP was not filing CTRs; and that records of AIP's accounts at PNB showed that in 1981 and 1982 AIP had deposited a total of approximately $2.4 million in currency in individual amounts of $10,000 or less, even though the amounts deposited per visit exceeded $10,000 on approximately 79 occasions. *Id.* at 82-83. The affidavit also stated that AIP's currency activities were continuing. *Id.* at 90-93.

Pursuant to the warrant, 37 government agents conducted a ten-hour search of AIP's offices. During the search, an AIP employee informed the agents that AIP stored documents in a separate area. After obtaining consent from petitioners and from Krzywicki, the agents searched that area as well. Pet. App. 40.

Before the indictment was returned, petitioners filed a motion pursuant to Fed. R. Crim. P. 41(e) for

return of the seized property. Following an evidentiary hearing, the district court granted the motion in part and denied it in part. Pet. App. 60-70. The court found that Agent Tate's affidavit established probable cause to believe that currency transaction violations had occurred. It concluded, however, that 13 of the categories of items to be searched exceeded the scope of the probable cause established by the affidavit. *Id.* at 62-64. Nevertheless, the court found that the agents had relied on the warrant in good faith, and it accordingly held that the seized evidence need not be returned or suppressed on overbreadth grounds. *Id.* at 64. The district court also held that the warrant was sufficiently particular, notwithstanding the general category contained at the end of the warrant. *Id.* at 65. Finally, the district court found that, although the execution of the search exceeded the scope of the warrant to the extent of some 46,000 documents, this was not the result of "a flagrant disregard for the terms of the warrant[]," but rather was the product of "misjudgment, carelessness and haste." Pet. App. 67-68. Accordingly, the court ordered that only the identified 46,000 documents be returned to petitioners and suppressed for purposes of trial. *Id.* at 68.

2. The court of appeals affirmed. Pet. App. 1-59. The court held that although petitioners, as bank customers, could not be held liable for substantive violations of the Currency and Foreign Transactions Reporting Act, they were properly convicted, pursuant to 18 U.S.C. 2(b), for causing PNB to fail to file CTRs. Pet. App. 14-31. The court also held that the district court did not err in admitting the evidence seized from AIP's offices. *Id.* at 39-48. It stated that "[t]he affidavit clearly supported the fact

that a broad range of documents would be entailed in sorting out the details of this sophisticated scheme," and the court concluded that "[g]iven the complex nature of a money-laundering enterprise," it could not say "that the categories overdescribed the extent of the evidence sought to be seized." *Id.* at 44. The court also held that the warrant was sufficiently particular (*id.* at 45-46), that the agents had acted in good faith (*id.* at 46-47), and that there had been no deliberate disregard of the warrant's restrictions (*id.* at 47-48).

ARGUMENT

1. Petitioners contend (Pet. 10-21) that this Court should review the government's theory that it is illegal to structure currency transactions so as to avoid the currency reporting requirements. The same claim has been before the Court in several recent cases, and in each case the Court has denied certiorari. See *Meros* v. *United States*, No. 89-39 (Oct. 30, 1989); *Lafaurie* v. *United States*, 108 S. Ct. 2015 (1988); *Perlmutter* v. *United States*, 108 S. Ct. 1110 (1988); *Florez* v. *United States*, 108 S. Ct. 1014 (1988); *Giancola* v. *United States*, 479 U.S. 1018 (1986); *Heyman* v. *United States*, 479 U.S. 989 (1986). In our briefs in opposition in those cases, we noted that there has been some division among the circuits on this and related issues arising from prosecutions under Section 5313.[3] Congress, however, has recently enacted the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18, which is included as Subtitle H of the Anti-Drug

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[3] We have furnished counsel with a copy of our brief in opposition in the *Meros* case, in which we restated the arguments that we had previously made in the *LaFaurie*, *Perlmutter*, *Florez*, *Giancola*, and *Heyman* cases.

Abuse Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 3207. The Money Laundering Control Act was expressly designed to overrule the cases that conflict with the result reached by the court of appeals here. The new law deprives the statutory issue presented in the petition of any continuing significance. Accordingly, petitioners' claim does not warrant further review by this Court.

a. Under Section 5313 and its accompanying regulations, only financial institutions have a duty to file CTRs in connection with cash transactions. Several courts of appeals have nevertheless recognized that under 18 U.S.C. 2(b) a defendant may still be held criminally liable for causing a financial institution to violate its statutory duties. *United States* v. *Lafaurie*, 833 F.2d 1468, 1470-1471 (11th Cir. 1987), cert. denied, 108 S. Ct. 2015 (1988); *United States* v. *Richeson*, 825 F.2d 17 (4th Cir. 1987); *United States* v. *Heyman*, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986); *United States* v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Puerto*, 730 F.2d 627 (11th Cir.), cert. denied, 469 U.S. 847 (1984); *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). See also *United States* v. *Thompson*, 603 F.2d 1200 (5th Cir. 1979). Other courts have taken a contrary view, holding that because 31 U.S.C. 5313 and the applicable regulations do not impose on third parties a duty to file CTRs, Section 2(b) cannot be read to impose criminal liability on third parties who, by structuring their transactions, cause a financial institution to fail to file a CTR. See, *e.g.*, *United States* v. *Gimbel*, 830 F.2d 621, 624-625 (7th Cir. 1987); *United States* v. *Larson*, 796 F.2d 244 (8th Cir. 1986); *United States*

v. *Reinis*, 794 F.2d 506, 508 (9th Cir. 1986); *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985).

Whatever the merit of the latter decisions in construing Section 5313, Congress has totally revised the law in this area by enacting the Money Laundering Control Act of 1986. The explicit purpose of the new Act was to overrule the decisions in *Anzalone* and *Varbel* and to codify the decision in *Tobon-Builes*, on which the court relied in the present case. Section 1354(a) of the Act, entitled "Structuring Transactions to Evade Reporting Requirements Prohibited," creates a new section of Title 31 (Section 5324), which provides as follows:

> No person shall for the purpose of evading the reporting requirements of Section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR, as well as for structuring deposits, as petitioners did here, for the purpose of evading the reporting requirements of Section 5313. In formalizing these statutory obligations, Congress made clear that its

purpose was to overrule the First and Ninth Circuit decisions in *United States* v. *Anzalone, supra,* and *United States* v. *Varbel, supra,* and the Eleventh Circuit decision in *United States* v. *Denemark,* 779 F.2d 1559 (1986). The Senate Committee on the Judiciary, reporting favorably on an identical provision in S. 2683, 99th Cong., 2d Sess. (1986), an earlier version of the money laundering bill, stated (S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986)):

> Under present law, money launderers are successfully prosecuted in some judicial circuits for causing financial institutions not to file reports on multiple currency transactions totaling more than $10,000 or causing financial institutions to file incorrect reports. In such cases, the actual money launderers are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and section 1001 (concealing from the Government a material fact by a trick, scheme, or device). For example, in *United States* v. *Tobon-Builes,* 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit Court of Appeals upheld a conviction under 18 U.S.C. 1001 where the defendants had engaged in a money laundering scheme in which they had structured a series of currency transactions, each one less than $10,000 but totalling more than $10,000, to evade the reporting requirements. * * * In contrast, the First Circuit Court of Appeals, in *United States* v. *Anzalone,* 766 F.2d 676 (1st Cir. 1985), the Eleventh Circuit Court of Appeals in *United States* v. *Denemark,* 779 F.2d 1559 (11th Cir. 1986), and the Ninth Circuit Court of Appeals in *United States* v. *Varbel,* 780 F.2d 758 (9th Cir. 1986) have held that structuring currency transactions to avoid the

reporting requirements did not violate 18 U.S.C. section 1001.

Subsection (h) would codify *Tobon-Builes* and like cases and would negate the effect of *Anzalone*, *Varbel* and *Denemark*. It would expressly subject to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, the proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

The House intended precisely the same results when it formulated a virtually identical version of the money laundering provisions. The Committee on Banking, Finance and Urban Affairs stated (H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-19 (1986)):

> In some judicial circuits, money launderers have been successfully prosecuted for causing financial institutions not to file reports on such multiple currency transactions. In such cases, defendants are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and Section 1001 (concealing from the government a material fact by a trick, scheme, or device).[4]
>
> In contrast, other cases have held that the Act and its regulations impose no duty on the cus-

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[4] For this proposition, the House Report cited the Eleventh Circuit's decision in *Tobon-Builes* (H.R. Rep. No. 746, *supra*, at 18 n.1).

tomer to inform the financial institution of the structured nature of the transactions, that the reporting duties are placed solely upon the financial institution, and therefore, only a financial institution can directly violate the reporting requirements.[5]

The Committee believes that Section 2 of H.R. 5176 would resolve the legal issues raised by the various circuit courts by expressly subjecting to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, it would create the offense of structuring a transaction to evade the reporting requirements, without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

In light of this new legislation, there is no reason to expect that the previous conflict among the circuits will persist. Accordingly, review by this Court is unwarranted.

b. In any event, the court of appeals' decision is correct under the law as it existed prior to the enactment of the Money Laundering Control Act of 1986.

The court below adopted the rationale of the Eleventh Circuit in *Tobon-Builes* (Pet. App. 18). In *Tobon-Builes*, the court held that although the duty to file CTRs is imposed only on financial institutions, a third party who causes the institution to violate its duties by structuring transactions may be convicted

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[5] For this proposition, the House Report cited, *inter alia*, *Anzalone* and *Varbel* (H.R. Rep. No. 746, *supra*, at 19 n.2).

under 18 U.S.C. 2(b).[6] That holding comports with the broad language of Section 2(b), which extends liability to anyone who "causes an act to be done which if directly performed by him or another would be an offense against the United States." As the reviser's note to 18 U.S.C. 2 states, the aiding and abetting statute

> removes all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.[7]

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[6] Correspondingly, third parties who, like petitioners, conspire to cause a bank to violate its reporting obligations may be convicted under 18 U.S.C. 371. See *United States* v. *Sans*, 731 F.2d 1521, 1530-1532 (11th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Lester*, 363 F.2d 68, 73-74 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

[7] The reviser's note also indicates that Section 2 was intended to embrace this Court's decision in *United States* v. *Giles*, 300 U.S. 41, 43 (1937). There, the Court upheld the conviction of a bank teller under a statute that prohibited bank employees from "mak[ing] any false entry in any book * * * of [a] Federal reserve bank or member bank." The defendant was convicted of having caused a bookkeeper for the bank to make false deposit entries in the bank's ledger, by wrongfully withholding from circulation certain deposit slips prepared for particular bank customers. Although the defendant had not himself made the false entries, and although the "innocent bookkeeper was the teller's * * * unconscious agent," the Court held that "the statute [was] broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows" (300 U.S. at 48-49). So, too, for Section 2(b): it applies even where the defendant, by his actions, causes an innocent intermediary

Those principles apply here as well. Although the use of structured deposits may prevent various banks from learning of their duty to file CTRs, a bank customer's success in that endeavor cannot shield him from liability under Section 2(b). Similarly, by agreeing to cause such structured deposits, petitioners were lawfully convicted of conspiracy, in violation of 18 U.S.C. 371.[8]

2. Petitioners renew their claims that all the records seized from AIP's offices should have been suppressed because the warrant was overbroad and because the agents conducted an unconstitutional general search in flagrant disregard of the warrant. Pet. 22-26. The court of appeals' ruling to the contrary presents no issue of general importance and thus does not warrant review by this Court.

a. The warrant in this case was not unconstitutionally overbroad. It is well settled that where the

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unwittingly to violate the law. Accord *United States* v. *Ruffin,* 613 F.2d 408, 412-413 (3d Cir. 1979); *United States* v. *Catena,* 500 F.2d 1319, 1322-1323 (2d Cir.), cert. denied, 419 U.S. 1047 (1974); *United States* v. *Levine,* 457 F.2d 1186, 1188-1189 (10th Cir. 1972); *United States* v. *Lester, supra.*

[8] Because petitioners were lawfully convicted for causing PNB to fail to file CTRs, their challenge (Pet. 20-21) to the jury instructions on the conspiracy count is meritless. In any event, petitioners were convicted on substantive counts corresponding to overt acts falling within both objects charged in the conspiracy count; it follows that the jury necessarily convicted petitioners on both of the charged objects. Finally, petitioners' claim (Pet. 21) that the allegedly erroneous convictions on the conspiracy count could have spilled over to the otherwise unchallenged AIP counts (counts 2-47) is frivolous. Counts 2-47 related solely to AIP's own failure to file CTRs; those counts had nothing to do with causing PNB to fail to file CTRs.

underlying affidavit establishes sufficiently broad probable cause, the warrant may authorize a comparably broad search and seizure. See *United States* v. *Hershenow*, 680 F.2d 847, 851 (1st Cir. 1982) ("[t]he particularity and probable cause requirements of the Fourth Amendment are * * * closely related"); see also *In re Impounded Case (Law Firm)*, 840 F.2d 196, 200 (3d Cir. 1988); *United States* v. *Christine*, 687 F.2d 749, 758 (3d Cir. 1982). Courts have accordingly approved property descriptions in search warrants that were as broad in scope as the probable cause demonstration in the supporting affidavit. In addition, since the scope of some forms of criminal activity, such as broad money laundering schemes, can be detected only by piecing together myriad financial documents, and since officers often do not know in advance what documents they may find, the courts have applied the particularity requirement with sufficient flexibility to allow the seizure of generically described documents.[9]

As the court below found, Pet. App. 44, the warrant affidavit "clearly supported the fact that a broad range of documents would be entailed in sorting out the details of this sophisticated scheme." Agent Tate's affidavit (*id.* at 79-103) detailed a pervasive money laundering scheme, and it showed that the

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[9] See, *e.g.*, *In re Search of 4801 Fyler Ave.*, 879 F.2d 385 (8th Cir. 1989) (any "correspondence, records, files, work orders, logs, or other documents" relating to hazardous wastes); *United States* v. *Brown*, 832 F.2d 991 (7th Cir. 1987) (generically described business records relating to fraudulent insurance claims), cert. denied, 108 S. Ct. 1084 (1988); *United States* v. *Kail*, 804 F.2d 441 (8th Cir. 1986) (warrant for almost all the defendant's business records); *United States* v. *Brien*, 617 F.2d 299, 306 (1st Cir.) (same), cert. denied, 446 U.S. 919 (1980).

scheme would be reflected in a wide array of records. In light of that showing, the court of appeals was plainly correct in concluding (*id.* at 45) that "[i]t is not unreasonable that a large bulk of American Investors' business dealings may have been influenced by the scheme." As the court put it, "[g]iven the complex nature of a money-laundering enterprise," it cannot be said that the search warrant "over-described the extent of the evidence sought to be seized" (*id.* at 44).

Nor, as petitioners contend (Pet. 23), does the final, general reference in the warrant to the CTR and conspiracy statutes render the warrant overbroad. That general provision follows a list of 19 specific categories of documents to be seized. As this Court has noted, a general reference in a search warrant must be construed in light of prior specific categories. See *Andresen* v. *Maryland*, 427 U.S. 463, 479-482 (1976). Under that standard, the search warrant in this case was sufficiently particular.[10]

b. Even if the warrant in this case was overbroad, the agents acted in good faith in obtaining it, and the evidence seized was therefore properly held admissible under this Court's decisions in *United States* v. *Leon*, 468 U.S. 896 (1984), and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984). In *Leon*, this Court held that the exclusionary rule "cannot be expected and should not apply, to deter objectively reasonable law enforcement activity." 468 U.S. at 919. The court reasoned that, if an officer has ob-

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[10] Because the warrant in this case did not authorize a search simply "with reference to a broad federal statute" (Pet. 23)—but instead delineated 19 precise categories of records—petitioners' reliance on the decisions cited at page 23 of the petition is misplaced.

tained a warrant, the deterrent value of the exclusionary rule is vitiated by the fact that the officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the search warrant is technically sufficient. *Id.* at 921.

The good faith exception may apply even if a search warrant is overbroad or fails to describe the things to be seized with sufficient particularity. The Court's decision in *Massachusetts* v. *Sheppard, supra,* makes that clear. In *Sheppard,* the trial judge suppressed evidence seized during the execution of a search warrant that incorrectly identified the items to be seized as evidence of a narcotics transaction, rather than a murder. Relying on *Leon,* this Court reversed, emphasizing that the officers had demonstrated their good faith by submitting an affidavit to a judge and thereafter relying on the judge's determination that the warrant he issued was sufficiently particularized. 468 U.S. at 989-991. See also *Illinois* v. *Krull,* 480 U.S. 340 (1987) (applying *Leon* to a state law, later held invalid, that authorized a warrantless search, even though the statute could have been more narrowly drawn).

The same considerations that prompted this Court to apply the good faith exception in *Leon, Sheppard,* and *Krull* are also present here. The court of appeals determined, correctly in our view, that the warrant was not overbroad; the district court, although finding the warrant overbroad in some respects, nonetheless found that the case was close and the question difficult (see Pet. App. 64). The requirement that a warrant contain a particularized description of the property to be searched includes "a practical margin of flexibility" depending on the facts in each case.

United States v. *Wuagneux*, 683 F.2d 1343, 1349 (11th Cir. 1982) (collecting cases), cert. denied, 464 U.S. 814 (1983). That is especially true in cases "involving complex financial transactions." *Ibid.*[11] In short, the warrant, if deficient at all, was not so "facially deficient" that the executing officers could not have reasonably presumed that it was valid. See *United States* v. *Luk*, 859 F.2d 667, 677-678 (9th Cir. 1988); *United States* v. *Kepner*, 843 F.2d 755, 763-764 (3d Cir. 1988); *United States* v. *Diaz*, 841 F.2d 1, 6 (1st Cir. 1988); *United States* v. *Gros*, 824 F.2d 1487 (6th Cir. 1987); *United States* v. *Buck*, 813 F.2d 588, 592-593 (2d Cir.), cert. denied, 108 S. Ct. 167 (1987); *United States* v. *Michaelian*, 803 F.2d 1042, 1046-1047 (9th Cir. 1986); *United States* v. *Weinstein*, 762 F.2d 1522, 1531 (11th Cir. 1985), cert. denied, 475 U.S. 1110 (1986).

Contrary to petitioners' contention (Pet. 26), the fact that the officers may have seized some records that were beyond the scope of the warrant does not make the good faith exception in *Leon* unavailable. Instead, the question whether all the evidence must be suppressed depends upon whether the officers acted in flagrant disregard of the warrant. See *United States* v. *Tamura*, 694 F.2d 591, 597 (9th Cir. 1982); *United States* v. *Christine*, *supra*. Affirming the findings of the trial court (Pet. App. 67-68), the court of appeals correctly held (*id.* at 48) that there was no such flagrant disregard in this case. To execute

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[11] As this Court has recognized with respect to the particularity requirement, "the complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that * * * evidence of [a] crime is in the suspect's possession." *Andresen* v. *Maryland*, 427 U.S. at 480-481 n.10.

the warrant in this case, the agents were required to search all of AIP's records in order to identify the items to be seized. In making the actual seizure, moreover, the agents could reasonably select not only the specific records identified in the warrant, but also ledgers and file folders that contained the specified records—even if not all of the information in the ledgers or folders was covered by the warrant. *United States* v. *Christine*, 687 F.2d at 760; see also *United States* v. *Beusch*, 596 F.2d 871 (9th Cir. 1979). And the agents exercised considerable restraint in undertaking the authorized seizure—employing 37 agents, over a 10-hour period, and obtaining consent to search a storage area not expressly covered by the warrant.[12] The courts below were therefore plainly correct in refusing to order the suppression of all of the seized evidence on the ground that the agents may have seized certain records not within the ambit of the warrant.[13]

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[12] By contrast, it required petitioners' expert some 400 hours of examining the seized records to conclude that 46,000 documents were not properly seized under the warrant. Gov't C.A. Br. 51.

[13] By contrast, the search in *United States* v. *Medlin*, 842 F.2d 1194, 1197 (10th Cir. 1988), on which petitioners rely (Pet. 24, 26), far exceeded the scope of the warrant, and thus the court in that case held that the scope of the search undermined the particularity of the warrant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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